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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF ARIZONA

12 Bryan Nichols,

13 Plaintiff,

14 vs.

15 GC Services, LP,

16 Defendant.

No. CV 08-1491-PHX-FJM

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Oral Argument Requested

17 Defendant GC Services LP, pursuant to FR.Civ.P. 56, moves for summary
18 judgment on Plaintiff's claims that Defendant violated the Fair Debt Collection Practices
19 Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* This motion is supported by the record in this
20 matter, Defendants' separate statement of facts filed herewith, and the following
21 Memorandum of Points and Authorities.

22 **I. MATERIAL FACTS**

23 **A. Background and Claims:**

24 This FDCPA action involves collection activity undertaken by defendant GC
25 Services, LP ("GC") against Plaintiff Bryon Nichols, on account of a student loan taken
26 out by Mr. Nichols from the Department of Education many years ago. For the purposes
of this motion, GC admits that Plaintiff is a "consumer" as that term is defined by the Fair
Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §1692a(3)m and that GC is a debt
collector. Mr. Nichols denies that he ever took out a student loan, yet admits that he

1 might have done so but does not remember; however, the amount and validity of his
2 student loan debt is not material to the motion or his FDCPA claim in general.

3 GC regularly attempts to collect on defaulted student loans on behalf of the
4 Department of Education. Its services consist of attempting to negotiate a payment plan
5 or pay-off plan with the debtor. GC does not sue student loan debtors or pursue
6 garnishment against defaulted student loan debtors. If its efforts to negotiate a payoff or
7 obtain a payment plan with debtors fails, GC reports as much to the Department of
8 Education and recommends that the Department pursue its collection remedies against
9 the defaulted debtors.

10 **B. Defendant's Collection Activities:**

11
12 In this case, the Department of Education assigned the Bryon Nichols student loan
13 account to GC on January 21, 2008. Defendant's Statement of Facts ("DSOF") ¶3. GC
14 began its collection activity on January 24, 2008, by sending him a "30A" letter. DSOF
15 ¶5. The letter was mailed to Mr. Nichols at 1041 West Harvest Street, Mesa, Arizona –
16 an address at which Mr. Nichols regularly receives mail, and one he uses as his
17 permanent mailing address. DSOF ¶¶5, 12. The 30A letter, and two letters later mailed to
18 Mr. Nichols, contained all the language, information and notices required by 15 U.S.C.
19 §1692g(a)(3), (4), and (5). DSOF ¶¶6, 7, 8, and Exhibit G-1 through G-3 to Grover
20 Affidavit.

21 Also as a part of its collection activities, GC collectors telephoned Mr. Nichols at
22 his place of employment, when they could not locate a home telephone number for him.
23 Exhibit A. There is no evidence in the record that Mr. Nichols' employer – Granberry
24 Supply Company – has a policy forbidding employees from making or receiving personal
25 telephone calls, nor did Mr. Nichols ever inform GC that his employer had such a policy.
26 Exhibit A. Mr. Nichols never told GC not to call him at his place of employment until

1 his attorney sent a cease and desist letter on July 1, 2008. Grover Affidavit ¶15. GC
 2 made no further calls to Mr. Nichol at his place of employment after receiving that letter.
 3 Grover Affidavit ¶17; see also Exhibit A.

4 In undertaking collections for the Department of Education, GC does not sue
 5 debtors or undertake to garnish debtors' wages. Its activities are limited to attempting to
 6 collect payments from debtors or negotiate payment plans with debtors. If GC's
 7 activities are not successful, GC makes recommendations to the Department of Education
 8 as to how it might pursue other collection avenues. The correspondence sent to Mr.
 9 Nichols by GC, on behalf of the Department of Education, clearly informed Mr. Nichols
 10 of possible consequences to him if his account should remain in default, and the
 11 information GC imparted was true. See Exhibits G-1 through G-3.

12 **II. ARGUMENT**

13 **A. GC's initial communications satisfied the notice requirements of U.S.C.** 14 **§ 1692g**

15 Mr. Nichols claims that GC failed to provide him with the information and notices
 16 required by the FDCPA, § 1692g. In fact, the first collections activity taken by GC with
 17 respect to Mr. Nichols was to mail a letter to him (Form Letter 30A) that included all the
 18 information required by the Act. The letter was mailed to Mr. Nichols at his parent's
 19 address, which is one he admits receiving mail at. His mother testified in her deposition
 20 that Mr. Nichols (and his other grown siblings) all receive mail regularly at her home,
 21 and she keeps it for them to retrieve at their convenience.

22 On June 11, 2008, a collector from GC spoke with Mr. Nichols at his place of
 23 employment. See Exhibit A, Account Detail Listing. At that time, GC's records
 24 indicated 1041 West Harvest Street, Mesa, was Mr. Nichols' residence, but when the
 25

1 collector tried to confirm that address for him, Mr. Nichols said he had not lived at that
2 address in years, but wanted to keep it as his mailing address.

3 GC's Account Detail Listing demonstrates that in all, three letters were mailed to
4 Mr. Nichols at his 1041 West Harvest Street, Mesa, Arizona address. Letter 30A was
5 mailed on January 24, 2008; Letter 30W was placed in the mail to him on February 16,
6 2008. Letter 30B was sent on March 7, 2008. All three of those letters complied with §
7 1692g. None of those letters were ever returned to GC Services. GC has adequately
8 demonstrated that it provided the required information to Mr. Nichols in its initial
9 collections communications to him, and summary judgment should be entered in its favor
10 on the Plaintiff's § 1692g claim.

11
12 **B. Defendant complied with Mr. Nichols' "cease and desist" request
immediately on receiving it.**

13 The FDCPA prohibits a debt collector from contacting a debtor after receiving a
14 request from the debtor to cease all such contact. The first communication GC Services
15 ever received from Mr. Nichols containing that message was when it received a cease and
16 desist letter from Marshall Meyers, Mr. Nichols' attorney. That letter, dated July 1, 2008,
17 was received by GC on July 8th. Immediately after receiving it, GC entered the
18 substance of the letter into its Account Detail Listing and noted that there was to be no
19 further contact with the debtor. In furtherance with its efforts to avoid even inadvertent
20 contact with Mr. Nichols after receiving the letter, and consistent with its policy of
21 complying with such requests, GC also immediately removed the contact information for
22 Mr. Nichols and substitute the address and telephone number of his attorney, Mr. Meyers,
23 into its record.

24 Mr. Nichols has not disclosed, let alone provided any evidence that GC contacted
25 him after receiving his cease and desist letter.
26

1
2 **C. GC did not violate § 1692c(a)(c) when it contacted him through his**
3 **place of employment**

4 Plaintiff complains that GC violated the FDCPA when it telephoned him at his
5 place of employment. The FDCPA does not contain a blanket prohibition against calls to
6 the debtor's place of employment. Rather, it forbids calls to the debtor's place of
7 employment "if the collector knows or has reason to know that the [debtor's employer]
8 prohibits the [debtor] from receiving such communication." *See* 1692c(a)(3).

9 There is no evidence in the record that Mr. Nichols' employer, Granberry Supply,
10 has or had a policy prohibiting its employees from personal use of the telephone. The
11 employer did not have such a policy, and GC Services obviously had "no reason to
12 know" that Granberry imposed such a restriction.

13 Furthermore, it was on June 27, 2008 that Mr. Nichols, for the first time ever,
14 communicated to GC that he did not want calls at his place of employment any longer.
15 See Account Detail Listing page 8, 6-27-08 (11:27 entry). GC immediately thereafter
16 removed Mr. Nichols' employment contact number from his records and noted in his
17 account that there were to be no more calls to his place of employment.

18 **D. There is no admissible evidence that GC violated the FDCPA by**
19 **communicating with any third parties about his student loan**
20 **obligation.**

21 The Plaintiff claims that collectors from GC Services had unauthorized
22 communications with all manner of third-parties about his defaulted student loan, but he
23 has not disclosed or produced any credible evidence of such improper contact. The
24 FDCPA, at § 1692c(b), does prohibit debt collectors from communicating with third-
25 parties about a consumer's debt (except to obtain location information).
26

1 On December 3, 2008, GC asked Mr. Nichols in an interrogatory to identify all
2 third-parties he contends GC improperly communicated with regarding his student loan:
3 INTERROGATORY 2. State the date, time, mode of communication, substance of
4 communication, and person(s) communicated with, for each instance in which you claim
Defendant communicated with Plaintiff or Plaintiff's family members, in violation of the
FDCPA.

5 Mr. Nichols responded on January 19, 2009, as follows:

6 "ANSWER: See Objection to Interrogatory #1." That objection reads:

7 [OBJECTION] Plaintiff is unable to answer this question thoroughly because Plaintiff
8 does not possess detailed records of Defendant's activities. Plaintiff's allegations are
9 based on direct experience of specific events. Plaintiff did not expect to need to document
10 Defendant's activities in a detailed manner and does not regularly document his activities
11 with other agencies in his daily life. Defendant is presume to have a detailed record of its
12 debt collection activities that could provide an answer to this question. Plaintiff is in
13 possession of Defendants' collection record, but code is used in the record and therefore
the record must be deciphered before use in answering this interrogatory. Please see
Plaintiff's Rule 26 Disclosure Statement, Defendant's Rule 26 Disclosure Statement,
Plaintiff's Complaint, Defendant's Answer, Defendant's discovery responses, the
deposition of Defendant, and any other disclosures by either party already made or yet to
be made. Plaintiff will seasonably supplement all disclosures if new information is
obtained.

14 See Exhibit B, Plaintiffs Answers and Supplemental Answers to Defendant's
15 Interrogatories.

16 Mr. Nichols' initial answer to Interrogatory #2 went on to "refer" GC to his
17 answer to Interrogatory #7, which identified Pam and Phil Mink and Glen Nichols, at
18 1041 West Harvest in Mesa, giving their telephone number as 480-962-5340, Jasmine
19 Zummallen, telephone number 480-233-3772, and his son Jordan Nichols (age 10), with
20 an unknown phone number.

21 By this Answer, Plaintiff admitted that he did not know when he filed his lawsuit,
22 and did not know by the time he answered discovery, if GC made any unauthorized
23 contact with third parties in violation of the Act. He could not identify any specifics
24 about such communications, including what was said, by whom, or when such contacts
25
26

1 took place. Thereafter, Mr. Nichols' mother Pam Mink was deposed and testified that
2 she received numerous repeated and daily calls from someone at "GC Financial."

3 After Defendant's 30(b)(6) representative was deposed in this case, GC conducted
4 a search of its records to determine if and when telephone calls were placed by GC
5 collectors to any of the telephone numbers Plaintiff identified for "third parties." The
6 search included all outgoing calls from the three offices which handled Department of
7 Education accounts (Knoxville, Columbus and Tucson), and asked to identify calls
8 placed between January 1, 2008 and July 1, 2008, to any of the numbers identified by the
9 Plaintiff for third-parties. Between that time period, no calls were made by GC to 480-
10 962-5340 – Plaintiff's mother's telephone number. Two calls were placed to the
11 telephone number identified as Mr. Nichols' son Jordan's phone – one with no answer
12 and the other of a few seconds in duration. Mr. Nichols' testimony on GC's contact with
13 Jordan was only that Jordan told him either "GC called" or "call the man from GC."

14 There simply is no evidence in the record from which a reasonable jury could find
15 that GC had unauthorized contact, in violation of the FDCPA, with third-parties relating
16 to Mr. Nichols' debt. Summary judgment should be entered against Plaintiff on this
17 claim.

18
19 **E. Defendant did not "threaten" to take any unlawful action and there is**
20 **no evidence of record that GC falsely represented that it or the creditor**
would taken action when it had no intention to.

21 Mr. Nichols claims that GC violated § 1692e(5) by threatening to take action
22 against him that could not legally be taken. Again, there is no evidence that GC made
23 any such threats, represented that it would take action it did not intend to take, or in any
24 way communicated it would take action that it could not take. Focusing again on the
25 Plaintiff's answer to interrogatories, which asked him to divulge any details of such
26 unlawful communications, he was unable to identify any until he first reviewed the GC's

1 collection notes. When Mr. Nichols was deposed, he testified that he did not remember
2 any specific details about discussions he had with GC collectors on the telephone. Yet,
3 he still alleges that GC made improper threats in violation of the Act.

4 The only evidence of record regarding GC's communications to Mr. Nichols on
5 this issue is GC's Account Detail Listing and the three letters (30A, 30W and 30B) that
6 GC mailed to Mr. Nichols. Nothing in the Account Detail Listing indicates that GC
7 informed Nichols that it would sue him, that it would garnish him, or that it would
8 confiscate his tax refunds to satisfy his obligation. Nor do the letters of record
9 communicate any improper threats. To the contrary, the letters explicitly inform Mr.
10 Nichols of the potential consequences of his remaining in default – and not that GC
11 would take any action. The information imparted to Plaintiff regarding the potential
12 consequences was true: the Department of Education is legally authorized to levy an
13 administrative wage garnishment against student loan defaulters; it is legally authorized
14 to confiscate tax refunds for debtors in default, and it is legally authorized to sue such
15 debtors.

16 GC did inform Mr. Nichols that his refusal to make payments or try in any other
17 way to resolve the debt could result in an administrative wage garnishment, and in fact,
18 the Department of Education took steps to initiate such a proceeding against Mr. Nichols.
19 The Account Detail Listing in fact indicates that Mr. Nichols was warned several times
20 that the Department might take such an action against him, before the Department
21 initiated the proceeding.

22
23 **F. Mr. Nichols has not disclosed or produced any evidence to establish the**
24 ***prima facie* elements of the tort of invasion of privacy.**

25 Finally, the Plaintiff's Amended Complaint alleges the state tort claim of invasion
26 of privacy. In Arizona, this tort is limited to extraordinary and outrageous conduct. Mr.

1 Nichols has not provided any specific instances of conduct by the Defendant that qualify
2 as actionable and tortious.

3 Arizona law follows the Restatement of Torts with respect to the elements
4 necessary to establish the tort of invasion of privacy. *Hart v. Seven Resorts Inc.*, 190
5 Ariz. 272, 947 P.2d 846 (App. 1997). Invasion of privacy torts generally fall into two
6 categories: “false light” invasion and “intrusion on seclusion.” Mr. Nichols does not
7 claim that Defendant published private information about him that placed him in a false
8 light.

9 The tort of intrusion on privacy is different. The Restatement, as quoted in Hart,
10 says one is subject to liability for intrusion into another’s privacy if he “intentionally
11 intrudes, physically or otherwise, upon the solitude or seclusion of another of his private
12 affairs . . . if the intrusion would be highly offensive to a reasonable person.” 190 Ariz.
13 at 279, P.2d at 853. But liability is limited to those situations when the tortfeasor “has
14 intruded into a private place, or has otherwise invaded a private seclusion that the
15 plaintiff has thrown about his person or affairs.” *Id.*

16 Mr. Nichols has not even attempted to demonstrate a *prima facie* case for his
17 invasion of privacy claim and nothing in the record supports such a claim. Defendant
18 should have summary judgment on this claim as well.

19
20 **G. Conclusion**

21 Mr. Nichols’ FDCPA claims are simply unfounded. The Plaintiff had no facts to
22 support the suit when it was filed, and the expensive discovery he has conducted has
23 failed to produce any admissible, credible evidence to support his claims. The defendant
24 GC Services should be granted summary judgment on the record before this Court.

25 ///

26 ///

DATED this 13th day of July, 2009.

/s/ Victoria L. Orze
Victoria L. Orze
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on the 13th day of July, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Marshall Meyers, Esq. mmeyers@attorneysforconsumers.com Weisberg & Meyers, LLC 5025 North Central, Suite 602 Phoenix, Arizona 85012 Attorneys for Plaintiffs	
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By	/s/ Victoria Orze